No. 16,561

IN THE

United States Court of Appeals

For the Ninth Circuit

MARION JAMES LINDEN,
Appellant,

vs.

FRED R. DICKSON, Warden, California State Prison, San Quentin,
Appellee.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE

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I.

STATEMENT OF THE CASE

Marion James Linden applied to the United States District Court for a writ of habeas corpus on August 5, 1959. He had been convicted in the Superior Court of the State of California in and for the County of Los Angeles of murder in the first degree. He had been sentenced to death and the execution was scheduled for August 7, 1959. His appeal had been heard by the California Supreme Court and the conviction and sentence affirmed, *People v. Linden,* 52 Adv. Cal. 1 (1959).

He applied to the United States Supreme Court for certiorari and, while that application has not been acted upon, an accompanying request for stay of execution was denied.

In his petition for habeas corpus Linden alleged that at the time of trial he was incompetent by reason of insanity to waive counsel, that the trial court erred as a matter of law in permitting him to waive counsel and at his request defend himself, and that consequently petitioner was deprived of his liberty without due process of law as required by the Fourteenth Amendment to the United States Constitution. A letter to counsel for the applicant from Dr. Bernard Diamond is attached to the petition, but the letter was not incorporated by reference into the petition, nor was it offered or received in evidence before the district judge.

On August 5, 1959, the district court denied the application for habeas corpus on the ground that the question of petitioner's mental competence to waive counsel was purely a factual one which was considered and determined by the trial court, and that no federal question was presented (Order Granting Leave to File Application in Forma Pauperis and Denying Application). The district court did not issue an order to show cause, and no evidence was offered or received. The district court did not have before it the record of the state trial. The district court did consider the opinion of the Supreme Court of California affirming Linden's conviction and considering in detail the issue of competence to waive counsel.

Thereafter the district court declined to issue a certificate of probable cause for appeal. However, Circuit Judge Frederick G. Hamley did issue a certificate of probable cause, and the appeal from the order denying the application for a writ is now before this court.

The applicant makes two contentions on appeal:

(1) he contends that the district court erred in denying the application without holding a hearing or examining the state trial record, and

(2) he contends that, assuming the district court did not have to examine the state record, that court erred in denying the application on the basis of the facts appearing in the application and the opinion of the California Supreme Court.

The appellee contends, first, that from a procedural standpoint it is within the discretion of the district court to deny an application for habeas corpus by a state prisoner without holding a hearing or examining the complete state record when the state court opinion considers the same issue raised in the application and when the facts stated in the state court opinion are not controverted or supplemented by the applicant; and, second, on the merits, it is apparent that the applicant was not denied due process of law in the state court proceedings.

II.

ARGUMENT

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPLICATION FOR A WRIT OF HABEAS CORPUS WITHOUT HOLDING A HEARING OR REVIEWING THE COMPLETE STATE COURT RECORD

The applicant claims that the district court erred in denying the application on the basis of the papers before it and that the court was compelled to conduct further proceedings, either to hold a formal hearing or review the complete record of the state court proceedings. By record, we assume appellant means the reporter's and clerk's transcripts of the trial. The appellee submits that the district court is free to exercise its discretion in regard to the procedural mechanics of handling applications for habeas corpus by state prisoners and, depending on the issues raised and facts alleged in the application, may review whatever portion of the state record which satisfies the court that the applicant has not been denied his constitutional rights. In the case at bar, after examining the opinion of the California Supreme Court in light of the allegations in the application, the district court needed to proceed no further to satisfy itself that the application was without merit.

1. The application does not state facts which entitle the aplicant to a writ of habeas corpus

The application filed by Linden is very brief in its charging allegations. It is admitted that petitioner was furnished with counsel by the trial court. It is admitted that petitioner requested that appointed

counsel be removed and that he be allowed to conduct his own defense. The state trial court granted the request and petitioner did conduct his own defense. It is then alleged that "at the time of the trial he was, by reason of insanity, incompetent to waive counsel; that the trial court erred as a matter of law in permitting him to waive counsel and at his request permit him to represent himself; and that consequently petitioner was deprived of his liberty without due process of law . . ." (Application, 2:11-15). Attached to the application was a letter written to the attorney for the petitioner by Dr. Bernard Diamond, but the contents of the letter were not incorporated into the petition by reference nor was the letter offered into evidence before the district court.

It is fundamental that, as in all litigation, a prima facie case must be stated in an application for a writ of habeas corpus, *Brown v. Allen,* 344 U.S. 443, 502 (1952). The application must meet the test of alleging *facts* that entitle the applicant to relief (*Id.* at 461).

The application in the case at bar does not set forth facts which support the pleader's conclusion that the applicant was incompetent to waive counsel at the time in question. The mere allegation of incompetency is wholly a conclusion and may be disregarded, *United States ex rel. Holly v. Pennsylvania,* 81 F. Supp. 861, 871 (W.D. Pa. 1948), aff'd 174 F.2d 480 (3d Cir. 1949); see also *Collins v. McDonald,* 258 U.S. 416, 420 (1921); *Kohl v. Lehlback,* 160 U.S. 293, 296, 299 (1895); *Cuddy, Petitioner,* 131 U.S. 280, 286 (1888); *Hodge v. Huff,* 140 F.2d 686, 688 (D.C. Cir. 1944);

Osborne v. Johnston, 120 F.2d 947, 948 (9th Cir. 1941). By failing to set forth frankly and candidly the facts supporting his claim of a denial of due process, the applicant failed to state a *prima facie* case, *Dorsey v. Gill,* 148 F.2d 857, 868-869 (D.C. Cir. 1945); see, *Ex parte Hull,* 312 U.S. 546, 550-551 (1940).

In a habeas corpus proceeding by a federal prisoner where there was a claim of lack of competency to waive counsel, an application was denied in part due to the failure of the applicant to allege that the insanity was of such a character that it rendered him incapable of knowing of his right to counsel and of competently waiving it, even though the petitioner alleged a commitment for insanity prior to the federal trial. *Ex parte Hall,* 31 F. Supp. 673 (N.D. Cal. 1940). The application in the case at bar is obviously far more defective than the *Hall* application. There are no allegations of commitment, diagnosis, or conduct which would justify the conclusion that the applicant was in fact incompetent at the time of trial to waive counsel.

It is sometimes said that in a habeas corpus proceeding the petition need not be artfully drafted, since the majority of such petitions are filed by state and federal prisoners personally and without the assistance of counsel. However, the instant application was filed by an attorney on behalf of the state prisoner and the quality of Appellant's Opening Brief bears witness to the competency of his attorney. It seems likely that the omission from the application of specific factual allegations results from the nonexistence of any such facts.

2. However, the district court also examined the opinion of the California Supreme Court discussing and rejecting applicant's claim and, in light of the application and state court opinion, the district court did not abuse its discretion in denying the application without further proceedings

The district court did not limit itself to the application but also reviewed the opinion of the California Supreme Court. *People v. Linden,* 52 Adv. Cal. 1 (1959). In that opinion the state supreme court fully discussed the constitutional claim presented in the application. The facts as recited in that opinion will be discussed in detail with respect to the merits of the applicant's claim but may be briefly summarized at this point. Linden, who had two prior felony convictions and who, according to his own admissions, had previously been tried for murder, was furnished counsel at the outset of the trial. After five days of trial Linden became dissatisfied with his attorney and requested that an "advisory counsel" be appointed. The trial court declined to appoint an advisory counsel and declined to substitute another attorney at that stage of the proceedings. Finally, the trial court relieved counsel of record for Linden but permitted him to remain in an advisory capacity while Linden conducted his own defense. By this time the People had rested and the conduct of the trial thereafter was limited to final argument by Linden since no evidence for the defense was presented.

Upon the basis of this record the district court concluded that the issue of Linden's mental capacity to waive counsel was a factual issue for the trial court which was considered and determined by that court and that no federal question was presented.

Now the appellant complains that the district court, after reviewing the application and the state court opinion, had no discretion to rule on the application but should have either held a hearing or ordered that the entire record of the state trial be produced and reviewed. Appellant states the bold proposition that the district court must, in ruling on an application of this nature, hold a hearing or examine the entire state trial record.

For this proposition appellant rests initially on the following language from *Brown v. Allen*:

> "Applications to district courts upon grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more if the court is satisfied, by the record, that the state process has given fair consideration to the issues and offered evidence, and has resulted in a satisfactory conclusion . . .
>
> "It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice." *Brown v. Allen,* 344 U.S. at 463, quoted in Appellant's Opening Brief, 5:17-23.

This language appears in part III of Justice Reed's opinion which is entitled "Right To Plenary Hearing." That portion of the opinion considered the claim of one of the applicants that the district court erred in refusing a writ on the basis of an examination of the record in the federal and state courts instead of holding a plenary trial of the federal constitutional issues. *Brown v. Allen,* 344 U.S. at 460. The opinion was only

concerned with the question of whether the district court could deny the writ after reviewing the state record or whether it had to retry the issues. The complete state trial record had been received by the district court (*Ibid.*). The holding was simply that the district court was not required, as a matter of law, to hold a hearing.

It is a distortion of this language to take it literally for the proposition that a district court must, in the case of every application for habeas corpus, either review the complete state record or hold a hearing. Since the district court had in fact reviewed the complete state record the issue was only whether this procedure was adequate, not whether it was mandatory.

Justice Frankfurter, in his opinion which may be considered jointly with Reed's opinion on this point (*Id.* at 497), makes it clear that an application may and should be dismissed when it fails to state a good cause for relief (*Id.* at 502). The opinion goes on to discuss various procedural possibilities, emphasizing the necessity of "flexibility" (*Id.* at 503), and noting that it seems "unduly rigid to call for the state record in every case" (*Id.* at 504). However, Justice Frankfurter's opinion is addressed to the same question as Reed's, namely, whether the district court could deny an application after examining the state record without holding a hearing, and neither of the opinions was concerned with the propriety of denying an application in the absence of the state record or, more importantly, what the "record" must consist of.

In *United States ex rel. DeVita v. McCorkle,* 216 F.2d 743 (3d Cir. 1954), the Court of Appeals for the Third Circuit purported to define the "record" which is alluded to in *Brown v. Allen.* A state prisoner under a death sentence applied for a writ of habeas corpus the day before the time and place of execution were to be announced (*Id.* at 744). The district judge apparently felt that he had to dispose of the case immediately and after examining the application and the opinion of the New Jersey Supreme Court affirming the applicant's conviction, he denied the application. The court of appeals reversed, indicating that the district judge should have reviewed the "original state record" or ordered that a hearing be held (*Id.* at 747).

While this decision bears a superficial similarity to the case at bar, there are several distinguishing characteristics. First, the court of appeals concluded that the district judge "felt himself so circumscribed by the time element" that he limited his review of the state court record to the opinion of the state supreme court (*Id.* at 747). The court of appeals seemed to feel that the district judge wanted to read the entire record but did not do so because of press of time. Second, the district judge, after denying the application, issued a certificate of probable cause for appeal. Finally, the application alleged in detail the facts pertaining to the alleged denial of a constitutional right, see opinion on remand, *United States ex rel. DeVita v. McCorkle,* 133 F. Supp. 169, 172, fn. 18 (N.J.D. 1955).

In the case at bar none of these factors were present. The district judge was not, apparently, in any

hurry to decide this case. He did not base his decision on the state court opinion because of insufficient time to examine the trial record but rather because he was satisfied from the state court opinion that the application was without merit. The district judge also denied a certificate of probable cause. Moreover, the application is entirely devoid of specific factual allegations.

We must assume that the requirement of reviewing a state court record, when applicable, is not entirely a mechanical and artificial rule. Presumably, an examination of the record is required to accomplish some worthwhile purpose. It is not simply a ritual to be carried out by the district judge.

In the case at bar the opinion of the state supreme court contains a complete and thorough discussion of the alleged deprivation of constitutional rights upon which the application for a writ of habeas corpus is based. The application itself sets forth no factual allegations; it merely contains the conclusion that the petitioner was "by reason of insanity incompetent" to waive counsel. The application does not controvert any of the facts recited in the state supreme court opinion, nor does the application allege any facts in addition to those recited in the state supreme court opinion.

Moreover, the applicant was supplied the complete record of his trial, pursuant to California law[1] and yet

[1]In any case in which the penalty of death is imposed an appeal is automatically taken to the California Supreme Court (Cal. Pen. Code §1239) and the entire record of the trial is supplied to the defendant without cost (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 33(c), p. 29).

he failed to incorporate any pertinent portions of that record into his application or refer to any facts appearing therein which might controvert or supplement the opinion of the state supreme court. Whether or not an applicant should be required to incorporate in his application the portions of a state record available to him upon which he bases his claim of denial of a constitutional right,[2] it is entirely unreasonable to compel a district judge to indulge in the mechanical routine of examining a voluminous transcript when the state supreme court has adequately discussed the constitutional claim and the applicant, who has the complete trial record in his possession, has failed to controvert or supplement the facts recited in the state court opinion or incorporate or summarize facts appearing in the trial record which would support his claim of denial of a constitutional right.

The procedural mechanics of handling applications for habeas corpus in the federal courts by state prisoners have not been defined with rigidity. The habeas corpus statute simply declares that "the court shall summarily hear and determine the facts, and dispose of the matter as law and justice require" (28 U.S.C. § 2243). The supreme court has declared that a dis-

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[2]It has been stated that a petition in habeas corpus must, as part of stating a prima facie case, state by what authority the prisoner is detained, and if that authority is a warrant of commitment then he must attach or set out a copy of the warrant together with a copy of the "transcript of the record (or its essential parts) in the proceeding which resulted in the commitment," unless the applicant is unable to do so, *Dorsey v. Gill*, 148 F.2d 857, 868 (D.C. Cir. 1945). See also *Ex parte Hull*, 312 U. S. 546 (1940), where the Supreme Court indicated it would be improper to inquire into procedural due process when the applicant had not furnished the transcript of the trial proceedings.

trict court shall not give any weight to a denial of certiorari, *Brown v. Allen,* 344 U.S. 443 (1953), and has forbidden the determination of factual issues by affidavit, *Walker v. Johnston,* 312 U.S. 275 (1940). On the other hand, the court has approved the use of the order to show cause, *Walker v. Johnston,* supra, at 284, and has recognized the need for "flexibility" in habeas corpus proceedings, *Brown v. Allen, supra,* at 503, and deprecated "unduly rigid" procedural rules, *id.* at 504. None of the cases cited by appellant compel the examination of the complete trial record under the circumstances of the case at bar. As we have indicated above, *Brown v. Allen* was not concerned with the problem since the complete record had been reviewed by the district courts. *United States ex rel. DeVita v. McCorkle,* 216 F.2d 743 (3d Cir. 1954), involved a factual background in the district court not present in the case at bar. *Burwell v. Teets,* 245 F.2d 154 (9th Cir. 1957), simply indicates that the district court may call for the record, a proposition which we do not dispute. *United States ex rel. Rogers v. Richmond,* 252 F.2d 807 (2d Cir.) *cert. den.* 357 U.S. 220 (1958), held that it was improper for a district judge to hold a hearing *de novo* with respect to factual issues determined by the state courts without examining the state record and finding a "vital flaw" or "unusual circumstances" justifying a complete new trial (252 F.2d at 811). This decision presents the converse of the situation present here. The district judge in *Rogers* held a hearing without according any respect to the state court's determinations. Here the district judge has, in the absence of allegations controverting or

supplementing the facts stated in the opinion of the state supreme court, relied on a portion of the state record which is adequate under the facts and circumstances of this case.

Since no decisions of the U. S Supreme Court compel the result sought by the appellant, this court is free to exercise its own judgment in fashioning workable and realistic procedural rules. There are at least two fundamental difficulties with the procedural strait jacket in which appellant would confine federal district judges. The first is mechanical. What is the "record"? Under California law when a defendant takes an appeal from a judgment of conviction the record normally consists of a clerk's transcript containing certain specified portions of the proceedings and a reporter's transcript of oral proceedings with certain exclusions.[3] The transcripts may be supplemented on request of the defendant.[4] Where a death

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[3]The normal record on appeal consists of the following:

"(1) A clerk's transcript, containing copies of (a) the notice of appeal, and any request for additional record and any order made pursuant thereto; (b) the indictment, information or accusation; (c) any demurrer; (d) any motion for a new trial; (e) all minutes of the court relating to the action; (f) the verdict; (g) the judgment or order appealed from; and

"(2) A reporter's transcript of the oral proceedings taken on the trial of the cause and on the hearing of the motion for a new trial, excluding therefrom proceedings on the *voir dire* examination of jurors, oral or written instructions given or refused, opening statements, and arguments to the jury." (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 33(a), p. 28).

[4]The appellant may request the inclusion of the following:

"(1) In the clerk's transcript: (a) Written motions made or notices of motion given by the defendant or by the People, and affidavits filed in support of or in opposition to the motion

penalty has been imposed, the entire record of the action is prepared (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, 33(c), p. 29). Ordinarily in death penalty cases this record is extremely voluminous and in any particular case contains a good deal of matter which is wholly irrelevant to the particular claim of the applicant for habeas corpus. It is doubtful that a district judge must review and digest each and every page of these transcripts on his own motion. At least when this complete record is available to the applicant and he fails to incorporate or refer to any portion thereof in his application, it seems an undue burden to require a district judge to plow through these transcripts on the supposition that somewhere something may be found which will justify the claim of denial of a constitutional right. Certainly the proceedings on appeal from the conviction are also a portion of the state record, and where the opinion of the state su-

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for new trial or any other motion; (b) written instructions given or refused, provided, however, that if error is urged as to the giving, refusal or modification of instructions, the clerk's transcript shall include all written instructions given, and shall show at whose request they were given; (c) any written opinion of the superior court.

"(2) In the reporter's transcript: (a) Proceedings on the *voir dire* examination of jurors; (b) opening statements; (c) arguments to the jury; (d) any oral opinion of the superior court, and comments on the evidence by the trial judge before the jury; (e) instructions given, which cannot be copied by the clerk; provided, however, that if error is urged as to the giving, refusal or modification of instructions, the reporter's transcript shall include all instructions given which cannot be copied by the clerk.

"(3) To be transmitted as originals: Any exhibits admitted in evidence or rejected." (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 33(b), pp. 28-29).

preme court adequately deals with the claim of the applicant, a district judge should be able to rely on that opinion, in the absence of appropriate allegations in the application.

Secondly, any requirement that a district court review the trial record under the circumstances of the case at bar reflects an unjustified attitude of suspicion and distrust of state courts. To a certain extent this attitude appears in *United States ex rel. DeVita v. McCorkle, supra,* where the Court of Appeals for the Third Circuit indicated that a district court cannot rely on a state court opinion as the record even though that opinion discusses the evidence and draws factual and legal conclusions therefrom (216 F.2d at 746). The court noted certain conclusions of the state supreme court to the effect that a certain point found no support in the record and that a "fair inference" could be drawn from certain conduct. Then the court of appeals made the following observation:

> "Without looking at the state record it would be impossible for the district judge to know whether this point did find any other support in the record and whether the state supreme court's conclusion was 'a fair inference.' " (216 F.2d, at 747, fn. 9.)

If this language indicates that the federal courts cannot rely on the truthfulness and verity of a state court opinion, even in the absence of controverting allegations by the applicant, then we submit that the Third Circuit misconceives the proper role of habeas corpus. The federal courts do not sit as another ave-

nue of appeal for convicted felons. They sit for the purpose of insuring respect for federal constitutional rights. In doing so federal judges should at least be permitted to respect state determinations in the absence of specific allegations controverting or supplementing the recitals of fact and conclusions of the highest court of a state.

In conclusion, then, we submit that the district judge was entitled in his discretion to review only the state supreme court opinion in the case at bar and was not required to order the production of the complete state trial record, when (1) the state supreme court discussed the constitutional claim fully and recited in detail the facts surrounding the claim; (2) the application stated only a bare conclusion; (3) none of the historical facts stated in the state court opinion are controverted specifically in the application; (4) no facts in addition to those recited in the state court opinion are alleged in the application; (5) no reference is made in the application to the trial record nor is any portion thereof attached and incorporated in the application; and (6) the record was available to the applicant and had been available to him for his appeal to the state supreme court.

We may turn now to the question of whether the state court opinion adequately disposes of the contention of the applicant, namely, that he was not competent to waive counsel and that his lack of competency resulted in a denial of due process.

B. THE DISTRICT COURT DID NOT ERR IN DENYING THE APPLICATION FOR A WRIT OF HABEAS CORPUS ON THE MERITS

Linden was charged with murder in the state court. The People's evidence indicated that Linden became involved in a fight in a Los Angeles bar. He was removed by a police officer who took him outside, searched him for weapons, found none, and told him to go home. Later that night the officer again encountered Linden outside the bar, searched him and went to a nearby police call box. Linden then stepped to the officer's side, shot him twice and ran away. The officer fired at Linden, who returned the fire. Later the officer died from the wounds inflicted by Linden. *People v. Linden,* 52 Adv. Cal. 1, 11 (1959).

Recognizing the defendant's right to counsel, the California trial court appointed an attorney to defend Linden after he refused to accept the services of the public defender. The attorney represented him until the fifth day of the trial when Linden interrupted the proceedings, claiming that the attorney was not handling the case in the way in which Linden desired. The trial court reserved ruling on the questions of relieving the attorney and further representation of the defendant until the People concluded its case. A little more evidence was presented and the People rested. The trial court then instructed the defendant "fully and correctly" concerning his right to counsel, the lack of special privileges to a defendant who insists on representing himself, and the absence of any right to an advisory counsel in the capacity of errand boy. The trial court then relieved defendant's counsel

as attorney of record, and, with his consent, appointed him as legal advisor for the remainder of the trial. There was then considerable discussion as to the production of defense evidence. The district attorney produced all the evidence that Linden demanded and his advisory counsel prepared a subpoena for the production of certain witnesses. However, after a recess the trial court asked Linden if he wished to call his witnesses and the defendant rested. Apparently Linden presented his own argument to the jury. The jury returned a verdict of guilty with a recommendation that the death penalty be imposed (*Id.* at 14-15).

The Supreme Court of California has recognized that under the Fourteenth Amendment to the United States Constitution and under California law there must be an intelligent and understanding waiver of counsel in capital cases. The California courts have scrutinized carefully the proceedings surrounding a waiver of counsel and have not hesitated to find that a waiver was not valid under appropriate facts and circumstances. *In re James,* 38 Cal.2d 302, 240 P.2d 596 (1952); *People v. Chesser,* 29 Cal.2d 815, 178 P. 2d 761 (1947). On the other hand, counsel cannot be forced upon a defendant. *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279 (1942). Whether there has been an intelligent waiver depends on the particular facts and circumstances surrounding the case and should be determined by the trial court. *Johnson v. Zerbst,* 304 U.S. 458, 464-465 (1938).

The Supreme Court of California carefully considered the applicant's claim of lack of competence to

waive counsel on his appeal from the conviction. *People v. Linden,* 52 Adv. Cal. 1, 14-17. In rejecting this claim the court noted his "untenable but not naive argument" that his state constitutional (Cal.Const. Art. I, §13) and statutory (Cal. Pen.Code, §686) right to "appear and defend in person and with counsel" was "conjunctive" in character and entitled him to conduct his case personally and to be furnished counsel as well. The court noted his "alertness" to protect his rights in connection with ascertaining the adequacy of the indictment, and that, as a matter of fact, while he was not entitled to it, the defendant had the advisory services of counsel throughout the trial. The defendant was given every opportunity, with the assistance of the district attorney and his own advisory counsel, to obtain evidence in his defense. The trial court conducted lengthy discussions with Linden and had ample opportunity to observe his abilities and disabilities and did not deem him incompetent to waive counsel and proceed with his own case. The Supreme Court of California concluded that the defendant was fully aware of the situation when he insisted upon representing himself and, while he was not a trained attorney, the trial court committed no abuse of discretion in permitting him to waive counsel (*Id.* at 16-17).

In his application for habeas corpus Linden claims that he was not competent to waive counsel by reason of insanity. At this juncture in a collateral attack on his conviction Linden has the burden of showing by a preponderance of the evidence that he did not, in

fact, intelligently and understandably waive his right to counsel. *Moore v. Michigan,* 355 U.S. 155, 161-162 (1956). In his opening brief counsel for appellant styles Linden as "ignorant, unskilled, uneducated and *probably* mentally incompetent" (App. Op. Br. 8:16-17; emphasis added). No facts are alleged in the verified application in support of any of these supposed characteristics of Linden. Probably he was "unskilled" in the sense of lacking the training and experience of a practicing lawyer. However, so long as counsel cannot be forced on a person, this fact cannot alone constitute a constitutional infirmity. From the standpoint of long experience in criminal proceedings, the defendant had the benefit of two prior felony convictions, one for voluntary manslaughter, *People v. Linden,* 52 Adv. Cal. 1, 19. After his arrest the defendant claimed that he had "beaten one other murder rap." He stated that "he was going to be very hard to convict on this charge" *(Id.* at 12). There are probably few laymen with an equivalent background in criminal proceedings.

With specific reference to his claim of insanity, the applicant has failed to allege any facts which would support his claim. He has alleged no facts indicating any prior commitment to a mental institution or any treatment or diagnosis of mental illness whatever, nor are any facts alleged in the application with respect to his conduct which would support this conclusion. It is suggested in the opening brief that he was, at the time of trial, "probably mentally incompetent" and "probably mentally disturbed" (App.

Op. Br. 8:16-17, 10:12-13). He is said to be a "strong-willed, insistent individual," devoid of "emotional soundness." (App. Op. Br. 9:2-3, 10:25-26.) Apparently Linden is an arrogant and abusive person. He hated the police, deemed himself "tough to beat" in court, and was given to vicious obscenity (*People v. Linden, supra,* at 13). He was dissatisfied with his trial attorney when the latter did not follow his instructions (*Id.* at 14), and claimed that his attorneys on appeal had been "planted" by the district attorney and had "doublecrossed" him (*Id.* at 33). We must concede that this conduct indicates a disagreeable and antisocial personality which is consistent with the vicious and savage murder of a Los Angeles policeman for which he was convicted. However, these personal characteristics certainly do not bear out any claim of a lack of competency in the sense of a lack of mental ability to understand the charges and the proceedings. Unless a disagreeable personality is synonymous with lack of competence the applicant has failed to make out any sort of a case.

The only evidence related in any way to insanity consists of a letter written by Dr. Bernard Diamond on July 31, 1959 and attached to the application. This letter was never incorporated by reference into the application, was not verified, and was never offered or received in evidence. While the letter is not properly before this court as part of the record on appeal, it is interesting to note the basic inconsistency appearing in Dr. Diamond's random comments based on the review of certain unidentified "letters and legal docu-

ments". The doctor is of the view that the trial court could not be "blamed for regarding him [Linden] as normal." Yet the doctor also opines that the issue of the defendant's competence should have been raised at the trial. He does not say who should have raised this issue, since he admits that Linden's conduct was not sufficient to alert the trial court to regard him as anything other than normal. Unless the Constitution of the United States demands a full hearing on the question of mental competence whenever there is an attempted waiver of counsel, even though the trial court is entirely justified from the defendant's conduct in concluding that he has sufficient mental ability to proceed in his own defense, then Dr. Diamond's letter adds nothing to this case even if accepted at face value.

This is not the case of a young boy, inexperienced in judicial proceedings, who waives counsel under pressure from law enforcement authorities or motivated by fear of mob violence. See, for example, *Moore v. Michigan,* 355 U.S. 155 (1957). Instead, it involves a confirmed criminal with two prior felony convictions who accepted the services of court-appointed counsel throughout the primary portion of the people's case.[5] He then claimed the right to conduct his own defense and in addition have available to him the services of an advisory counsel. While the trial court denied his right to advisory counsel, as a practical matter the court-appointed counsel, after being relieved as attor-

[5]When Linden requested that his court-appointed attorney be relieved, he admitted that counsel "has been very fair with me and he has been a very good attorney," to which the trial judge responded, "Yes, he has." *People v. Linden,* 52 Adv. Cal. at 14, fn. 2.

ney of record, remained throughout the proceedings as an advisor. The defendant demonstrated alertness as to his legal rights, and the trial court accepted his waiver of counsel only after fully instructing him with respect to his rights and the responsibilities which he would assume if he waived counsel. Still the defendant persisted in his waiver, which was finally accepted. There is nothing in the opinion of the state supreme court which establishes any alleged lack of competence of the defendant to waive counsel. The application adds nothing of a factual character. From the record before this court, there is nothing to indicate that the applicant at the time of trial manifested his incompetence to waive counsel so that the trial judge, by ignoring his lack of competence and accepting the waiver, deprived the applicant of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

III.

CONCLUSION

The district court denied an application for a writ of habeas corpus by a state prisoner in the case at bar. While the application alleged merely the conclusion that the applicant was incompetent by reason of insanity to waive counsel and failed to state a *prima facie* case, the district judge examined the opinion of the California Supreme Court affirming the conviction and death sentence of the applicant. The state supreme court opinion gave full consideration to the alleged

denial of a constitutional right invoked in the application and recited in detail the factual proceedings at the trial. Since the application did not controvert or supplement the facts stated in the state supreme court opinion and since the application did not incorporate or refer to any portion of the trial record in support of the grounds stated in the application, it was not necessary for the district court to conduct any further proceedings, either by holding a hearing or reviewing the state trial record. The state court opinion and the application do not sustain the applicant's burden of establishing that he did not, in fact, intelligently and understandably waive counsel. Therefore, the order of the district court denying the application for a writ of habeas corpus should be affirmed.

Dated, San Francisco, California,
October 14, 1959.

Respectfully submitted,

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